MAJLIS AMANAH RA'AYAT

v.

THE OFFICIAL RECEIVER, MALAYSIA

FEDERAL COURT, IPOH
SALLEH ABAS CJ (MALAYA)
ABDUL HAMID OMAR FJ
EUSOFFE ABDOOLCADER FJ
[CIVIL APPEAL NO. 210 OF 1982]
4 FEBRUARY 1984

COMPANY LAW: *Winding up - Appointment of liquidator - Notice to creditors for proof of debt - Claim rejected by liquidator - Effective date of debt - Whether the date of order or the date of commencement of winding up - Companies Act 1965, s. 219(2).*

BANKRUPTCY: *Insolvency - Applicability of s. 40(3) of the Bankruptcy Act - Effect of - Effective date - Whether date of winding up order of the Court or the commencement of the winding up - Bankruptcy Act 1967, s. 40(3).*

On a petition presented by a creditor, on 14 November 1975, Ismail Mahyuddin Enterprise Sdn. Bhd. (the company), was ordered to be wound up and the respondent was appointed provisional liquidator thereof by a Court order dated 22 July 1976. The respondent was subsequently appointed liquidator of the company by an order made on 7 March 1977.

The respondent issued a notice dated 28 October 1976 to creditors of the company to prove their debts. In response the appellant lodged with the respondent a proof of debt for a sum of over two million dollars allegedly incurred as a result of an agreement it had entered into with the company and two other parties on 19 November 1975. The respondent rejected the appellant's claim on the basis that the debt had been incurred after the commencement of the winding up on 14 November 1975 and that there was no evidence to substantiate that the agreement had taken effect.

On appeal to the High Court, the learned Judge upheld the respondent's decision and dismissed the appeal, holding that the debts were incurred after the commencement of the winding up, as the amounts claimed were paid on 14 February, and 20 December 1977. The appellant appealed to the Federal Court.

Held:

The effective date for the purposes of determining the debt or liability of an insolvent company in liquidation by order of Court is the date of the order for winding up. Therefore in the instant case the effective date was 22 July 1976. Appellant's proof of debt was wrongly rejected.

[Appeal allowed with costs. Order of the learned Judge set aside. Proof of debt to be admitted.]

Cases referred to:

In re Daintrey, Ex parte Mant [1900] 1 QB 546
In re Northern Counties of England Fire Insurance Company, Macfarlane's Claim [1881] 17 Ch Div 337
In re Law Car And General Insurance Corporation [1913] 2 Ch 103
Re Pullins of Newcastle Pty. Ltd. [1966] 85 WN (NSW) 16

Legislation referred to:
Bankruptcy Act 1967, s. 40(1), (2), (3)
Companies Act 1965, s. 219(1), (2)

For the appellant - S.E. Rajah (Kevin Danker with him); M/s. Zain & Co.
For the respondent - Zaleha Yusof, Federal Counsel

JUDGMENT

Eusoffe Abdoolcader FJ:

A short, swift and simple solution to the point in issue in these proceedings was regrettably occluded by the manner in which the basic issue arising for determination was presented, discussed and considered before the matter came before us. It is not necessary for the purposes of this judgment to set out the facts of the case at any length as the issue involved is primarily one of law pertaining to the winding up by order of Court of Ismail Mahyuddin Enterprise Sdn. Bhd. ('the Company'), a company incorporated under the Companies Act, 1965. The Company was ordered to be wound up and the respondent was appointed provisional liquidator thereof by an order of Court made on 22 July 1976 on petition presented by a creditor on 14 November 1975. The respondent was subsequently appointed liquidator of the Company by an order made on 7 March 1977. By virtue of the provisions of s. 219(2) of the Companies Act the winding up was deemed to have commenced at the time of the presentation of the petition therefor, namely, 14 November 1975.

The appellant, in response to a notice dated 28 October 1976 issued by the respondent to creditors of the Company to prove their debts, lodged with the respondent a proof of debt for a sum of over two million dollars allegedly incurred as a result of an agreement it had entered into with the Company and two other parties on 19 November 1975 and a supplemental agreement of the same date and the execution of certain letters of guarantee and performance bonds by it between 10 June 1975 and 19 November 1975. The respondent, however, by a notice dated 20 April 1982 rejected the appellant's claim on the basis that the debt had been incurred after the commencement of the winding up on 14 November 1975 and that there was no evidence to substantiate the fact that the agreement of 19 November 1975 had taken effect. The appellant appealed to the High Court against this decision primarily on the ground that the debt or liability had in fact been incurred before the commencement of the winding up by negotiations which took place in early October 1975 culminating in agreement between the parties at a meeting held on 4 November 1975 and that the agreements of 19 November 1975 and the related documents were merely a formalisation of the agreement arrived at previously between the parties which was before the commencement of the winding up on 14 November 1975. Anuar J holding that the debts were incurred after the commencement of the winding up of the Company as the moneys claimed were in fact paid on 14 February and 20 December 1977, upheld the respondent's decision and dismissed the appeal on 12 July 1982. The appellant then brought this further appeal before this Court.

The fallacy, as we see it, in the consideration hitherto of the propriety and legal tenability of the appellant's claim lies in the determination of the effective date for the purposes of the proof of debt, *scilicet*, whether it is the date of the order for the winding up of the Company or that of the commencement of the winding up. That is the nub of the matter before us and we should perhaps digress to mention that, on the factual aspect, Mr. Rajah for the appellant had to concede when we put it to him that there was insufficient evidence on record to substantiate the appellant's contention that the debt or liability in question was in fact incurred before the commencement of the winding up on 14 November 1975. To revert to the

matter of the effective date, s. 219(1) of the Companies Act, in so far as it is material for present purposes, provides that in every winding up, subject in the case of insolvent companies to the application in accordance with the provisions of the Act of the law relating to bankruptcy in force for the time being in the State of Malaya, all debts payable on a contingency and all claims against the company present or future certain or contingent ascertained or sounding only in damages shall be admissible to proof against the company. As the Company is insolvent, the provisions of s. 40(3) of the Bankruptcy Act, 1967 which would accordingly apply stipulate that save as provided in sub-sections (1) and (2) (which are not relevant in this case), all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy.

For the purposes of the Bankruptcy Act the effective date for debts provable in bankruptcy is the date of the receiving order, but when the provisions of s. 40(3) of the Bankruptcy Act are applied to an insolvent company by virtue of s. 219(1) of the Companies Act the question arises in the case of a winding up by the Court as to whether the effective date in relation thereto is that of the winding up order of the Court or of the commencement of the winding up under s. 219(2) of the Companies Act. We would refer to two *indicia* in this regard which we consider significant. First, s. 40(3) of the Bankruptcy Act which is referentially made applicable by s. 219(1) of the Companies Act specifically refers to the date of the receiving orders and not that of the act of bankruptcy (cf. *In re Daintrey, Ex parte Mant* [1900] 1 QB 546). And second, the prescribed form of proof of debt requires a proving creditor to affirm *inter alia* that the named company was at the date of the order for winding up, and specifically stating that date, justly and truly indebted to it in the sum mentioned and still is.

The decision in *In re Northern Counties of England Fire Insurance Company, Macfarlane's Claim* [1881] 17 Ch Div 337 is useful and pertinent to the issue involved in the appeal before us. It was held in that case that the holder of a fire policy issued by a fire insurance company is entitled, upon the company being ordered to be wound up, to prove in the winding up a claim on account of a fire which had occurred after the presentation of the petition but before the order to wind up; Jessel MR said in this respect (at page 342) that the point was not arguable and the claim was clearly provable. In *In re Law Car And General Insurance Corporation* [1913] 2 Ch 103 Cozens Hardy, MR said (at pages 118-119) in relation to the English statutory equivalent to s. 219(1) of the Companies Act that it was clear that the date of the winding up order, and not the commencement of the winding up, is the critical date for the purpose of that provision, and Kennedy LJ, held (at page 135) to the same effect. The whole question has been appropriately and exhaustively dealt with by Street J on the equity side in the New South Wales Supreme Court in *Re Pullins of Newcastle Pty. Ltd.* [1966] 85 WN (NSW) 16 (at pages 22-23) where he held that where a company is being wound up by order of the Court, the date as at which claims are to be estimated is the date of the winding up order and not the date of commencement of the winding up, following and applying *In re Law Car And General Insurance Corporation (supra)*.

It is clear therefore that the effective date for the purposes of determining the debt or liability of an insolvent company in liquidation by order of Court is the date of the order for winding up. The effective date in the matter before us would accordingly be 22 July 1976 and the appellant's proof of debt was therefore wrongly rejected by the respondent.

We accordingly at the conclusion of argument before us allowed the appeal with costs here and below, set aside the order of the learned Judge, made an order in terms of the appellant's motion of 10 May 1982 that its proof of debt be admitted and directed the deposit in Court to be paid out to the appellant.

Also found at [1984] 1 CLJ 76